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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 850

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

*Respondent.*

## Brief of Amicus Curiae in Opposition to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

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HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

*Respondent.*

## Brief of Amicus Curiae in Opposition to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

This brief is filed on behalf of the following named persons as *amicus curiae,* in opposition to a petition for writ of certiorari, the consent of counsel for petitioner and of the respondent in the above-entitled matter having been given pursuant to the rules of this Court:

Edith H. Hoffman
Southern Realty Company, a corporation
Florence G. Baldwin
V-R Ranch Co., a Corporation
Elizabeth Winship Alison
El Rancho Cola, a co-partnership
Muriel E. Cockerham
Ralph B. Nunnelly

John H. Dunshee
Frank G. Dunshee
Edward L. Lau
Margaret C. K. Lau
Charlotte F. Dunshee
Harvey Scott Dunshee, as guardian of the Estate of Charlotte F. Dunshee, an incompetent
Jack M. Eakins
Adele L. Eakins
Dorothy Battin
Boston Ranch Company, a corporation
R. A. Rowan & Co., a corporation
C. F. Costa
John Barcellos
Mary Barcellos
Manuel Rodrieges
J. C. Damann
O. W. Cave
Belle M. Cave
V. W. Finch
Clara B. Rutherford
Marvin Putnam
Fred Wilcox
Guy Wilcox
John Lewis
Jessie Lewis
Ray Traegor
Marcel Bertrand
Forrest Homer

All of the above named persons and corporations are landowners who are defendants in certain condemnation actions, the reference of which to commissioners gives rise to the petition for certiorari.

## Opinion Below.

The opinion of the Court of Appeals is reported at 274 F. 2d 856.

## Questions Presented.

1. Whether the Court of Appeals for the Ninth Circuit abused its discretion in denying a writ of mandamus against the Honorable Peirson M. Hall, the trial judge in particular actions, which would, if granted, have compelled him to vacate orders of reference of certain condemnation cases to commissioners pursuant to a discretion granted to him by Rule 71A(h), Federal Rules of Civil Procedure.

2. Whether the petitioner has established before the Court of Appeals for the Ninth Circuit that its right to the extraordinary writ of mandamus is clear and undisputable.

3. Whether the Honorable Peirson M. Hall, Chief Judge of the Federal District Court for the Southern District of California and the trial judge in particular actions involving the exercise of the power of eminent domain under the laws of the United States, where a jury trial had been demanded by the United States, properly exercised a discretion specifically granted by Rule 71A(h), Federal Rules of Civil Procedure, in referring the issue of just compensation in such actions to commissions pursuant to that rule where such references were made by him by reason of the character, location and quantity of the property to be condemned and for other reasons in the interest of justice.

4. Whether the orders of reference to commissioners by the Honorable Peirson M. Hall improperly referred to such commissioners anything other than the issue of just compensation, and whether petititoner has any standing to raise this issue.

## Rule Involved.

Rule 71A(h), Federal Rules of Civil Procedure, which governs in this matter, is printed in the petition for certiorari at page 2 thereof.

## Statement.

The petition for certiorari questions the propriety of a denial by the Court of Appeals for the Ninth Circuit of a writ of mandamus sought by the petitioner. That writ if granted would have compelled the Honorable Peirson M. Hall to vacate references by him of certain eminent domain cases to commissions pursuant to Rule 71A(h), Federal Rules of Civil Procedure.

### The Properties Involved.

In the period beginning on August 1, 1956 the United States of America filed four sets of eminent domain proceedings, which, for the purpose of convenience, are designated the Casitas Dam and Reservoir cases, the Lemoore Naval Air Station Cases, the Success Dam Cases, and the Terminus Dam Cases. There are involved in the Casitas Dam and Reservoir Cases 39 parcels and 135 persons or entities owning or claiming to own various tracts therein. (P. 26-27).[1] There are involved in the Lemoore Naval Air Station Cases 374 parcels and

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[1] "P." refers to the appendices to the Government's "Petition for Writ of Mandamus or other extraordinary relief in the Court of Appeals.

1537 owners. (P. 1.) There are involved in the Success Dam Cases 51 parcels and 330 owners. (P. 8, 12, 14.) There are involved in the Terminus Dam Cases 33 parcels and 185 owners. (P. 16.) The amount of land taken by the United States in the eminent domain proceedings involved in each of those sets of cases was large: in excess of 6,900 acres in the Casitas Dam and Reservoir Cases (P. 26); in excess of 30,400 acres in the Lemoore Naval Air Station Cases (P. 1); in excess of 3,600 acres in the Success Dam Cases (P. 8, 13, 14); and in excess of 2,700 acres in the Terminus Dam Cases (P. 17). The properties involved in each of the groups of cases were located at considerable distances from the normal place of federal trial: seventy-five miles in the Casitas Dam and Reservoir Cases (P. 94); forty miles in the Lemoore Naval Air Station Cases (P. 39); seventy-two miles in the Success Dam Cases (P. 47); and forty-three miles in the Terminus Dam Cases (P. 58). View of the properties by the body determining the issue of just compensation is hampered in the Casitas Cases, at least, by inaccessability (P. 87, 94, 123). Each of the groups of cases involve lands of varying characteristics, although lands devoted to similar uses in each group of cases are generally of similar character (P. 1, 8, 17, 27). Complex issues of valuation are present (P. 1, 8, 17, 27). The size of the takings and the number of separate cases filed by the United States make trial of any one group of related cases before one jury highly impracticable (P. 2, 9, 17, 27) so that uniformity of award for like property in any one of the four areas will be better achieved through the appointment of a commission appointed pursuant to Rule 71A(h) than by a jury trial (P. 3, 10, 19, 28). It should be noted at this juncture that the petition for certiorari as well as the

application for writ of mandamus contend that all of the properties in question are merely simple agricultural lands.[2] This contention finds no support whatsoever in the record (P. 1, 8, 17, 27, 85-87, 93, 95, 99-100, 104-106, 107-109, 111-112, 120-123, 128-130, 134).

**The Proceedings to Date.**

On May 7, 1959 the Honorable Pierson M. Hall, Chief Judge of the Federal District Court for the Southern District of California, referred the Lemoore Naval Air Station Cases to a commission of three persons appointed by him pursuant to the discretion granted by Rule 71A(h) (P. 1). On May 12, 1959 Judge Hall similarly referred the Success Dam Cases and the Terminus Dam Cases to a commission (P. 8). On May 20, 1959 he similarly referred the Casitas Dam and Reservoir Cases to a commission (P. 23). The orders of Judge Hall exercising the discretion granted to him by Rule 71A(h) based the reference to commissioners upon the following:

(1) The size of the properties involved (P. 1, 6, 8, 13, 14, 16, 22, 24);

(2) The location of the property (P. 1, 6, 8, 13, 14, 17, 22, 26);

(3) The nature of the property and its varied terrain and uses (P. 1, 8, 17, 27);

(4) The type and kind or nature of the rights or interests in the property claiming just compensation (P. 1-2, 8, 17, 27);

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[2]While the petition (p. 4) states that the order of reference in the *Lemoore Naval Air Station* case is typical in describing the property involved as an area largely devoted to agricultural uses, in fact the orders on the other three groups of cases describe the respective lands involved as of "varying terrain and devoted to various uses" (pp. 8, 17, 27).

(5) The complexity of the issues involved (P. 2, 8, 17, 27);

(6) The impracticability if not impossibility of trying the issue of just compensation of the various properties before one jury (P. 2, 8-9, 17-18, 27);

(7) The crowded condition of the calendar of the District Court for the Southern District of California and the desirability of the expeditious resolution of the groups of the cases referred to commissioners (P. 2, 9, 18, 27);

(8) The probability that the appointment of commissioners in each of the groups of related cases will result in more uniformity of awards for like property involved in the particular group of cases than could be expected if each case were tried by a jury (P. 3, 10, 19, 28).

Subsequently the petitioner moved to vacate the orders of reference and filed affidavits in support of its motion (P. 31-78). Various of the landowners filed counter affidavits (P. 82-139). The motions of the petitioner were overruled by the trial court (P. 140).

Shortly after their appointment the various commissions met and commenced proceedings. Some cases have been concluded. Others are well along in trial, and in virtually all instances the respective commissions have already viewed all or most of the properties, the issue concerning the valuation of which will come before them.[3] In virtually all instances each commission has heard much evidence common to a number of all of the cases referred to it. On or about December 12, 1959 the United States

[3]Many of these events have occurred subsequent to the proceedings in the Court of Appeals, see appendix page 1 *et seq.*

of America filed a petition for a writ of mandamus with the Court of Appeals for the Ninth Circuit, seeking an order requiring Judge Hall to vacate the reference to commissioners discussed above. On January 9, 1960 the Court of Appeals for the Ninth Circuit issued its opinion which is reported at 274 F. 2d 856. That opinion stated that while congestion of the calendar of the trial court standing alone is not sufficient reason for a Rule 71A(h) reference, that the orders of Judge Hall referring the particular groups of cases here involved to commissions gave consideration, in addition to calendar congestion, to (1) the nature of the property, its varied terrain and uses, (2) the type or kind and nature of the rights or interests in the property for which just compensation was claimed, (3) the complexity of the issues involved, (4) the improbability, if not impossibility, of the trial of the issue of just compensation of the various related properties before one jury, and (5) the probability that the appointment of commissioners will result in more uniformity of awards for like property than could be expected if each case were tried by a jury (Pet. for Cert. p. 28). The Court of Appeals also founded its opinion upon the proposition that it should not, in the case of proceedings seeking the extraordinary writ of mandamus presume that the orders of reference were not made upon proper ground but that the burden instead was upon the petitioner to make a clear showing that the relevant factors stated in a particular order of reference were not involved in that case. The Court of Appeals then found that the United States had failed to meet such burden.

## Reasons for Denying the Writ.

**Summary of Reasons Why the Writ Should Be Denied.**

1. No important issue of judicial administration is presented by these particular cases since Courts of Appeal in seven separate circuits have considered Rule 71A(h) Federal Rules of Civil Procedure and have applied uniform tests in determining the propriety of references thereunder.

2. The statistical data alleged by the petitioner to justify the issuance of the writ is incomplete in a manner which makes that data highly misleading as it is pertinent to the particular cases here involved.

3. A petition for certiorari is not a proper proceeding in which to seek an amendment to a Federal Rule of Civil Procedure.

4. The Court of Appeals did not abuse its discretion in denying the extraordinary writ of mandamus.

5. The petitioner did not establish before the Court of Appeals that its right to the extraordinary writ of mandamus is clear and indisputable.

6. The District Court Judge properly exercised his discretion in referring these particular cases to commissioners pursuant to Rule 71A(h), Federal Rules of Civil Procedure.

7. The orders of the District Court Judge do not refer to commissioners anything in excess of that which he was empowered to refer by Rule 71A(h).

**No Important Issue of Judicial Administration Is Presented by These Particular Cases.**

Rule 71A(h) gives to the trial judge a discretion in determining whether a jury or a commission will hear federal eminent domain cases where a jury is demanded. In granting that discretion, the Rule sets forth standards which will govern its exercise. This proceeding before this Court is not the time or the place to argue the wisdom of Rule 71A(h) or to seek its amendment. Courts of Appeal for the Second Circuit,[4] Third Circuit,[5] Fourth Circuit,[6] Fifth Circuit,[7] Eighth Circuit[8] Tenth Circuit,[9] and in the instant case, the Ninth Circuit, have considered validity of references under Rule 71A(h) and have set forth consistent standards.

Both the Rule and the decisions of the various courts of appeal establish that the validity of a reference pursuant to the Rule is to be tested by the standards set forth in Rule 71A(h). The fact that a particular judge may have referred a particular proportion of his total docket of condemnation cases to commissioners is, we submit, without materiality on the issue of the propriety of any particular reference without a showing that such

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[4]*United States v. Bobinski*, 244 F. 2d 299, 301 (C. A. 2).

[5]*United States v. Delaware, Lackawanna and W. R. Co.*, 264 F. 2d 112.

[6]*United States v. Cunningham*, 246 F. 2d 330.

[7]*United States v. Buhler*, 254 F. 2d 876.

[8]*United States v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492.

[9]In an earlier case, *United States v. Theimer*, 199 F. 2d 330, the Court of Appeals for the Tenth Circuit found a reference invalid. It applied the same standards in the later cases of *United States v. Waymire*, 202 F. 2d 550, and *United States v. Wallace*, 201 F. 2d 65, and found that reference to commissioners in those cases met the standards.

reference on its own facts is improper. It is also submitted that the statements made in the petition regarding the number of references to commissioners made in other districts do not present a reason why a writ of certiorari should be granted in the particular cases here involved. Firstly, the statistical statements made in the petition find no support in the record. Secondly, the statistics cited are, on their face, incomplete in that no data is given regarding the total number of pending eminent domain proceedings. Statistics presented by the Department of Justice for other purposes do shed some light upon that necessary information however. In the submission of the Department of Justice to the Congress in support of its requested appropriation for the fiscal year 1961 statistical data on work load was presented by the Department (Hearing Before the Committee on Appropriations United States House of Representatives on H.R. 1666, p 153). That data showed that there were pending as of the end of fiscal year 1959 a total of 39,846 land acquisition cases in the Department of Justice, of which 26,655 were condemnation cases. Thus, the 3,307 cases stated by the Department of Justice in its petition for certiorari (of which 1,377 are pending in the Eastern and Western District of Texas) to have been referred to commissioners constitute a significantly small percentage of the total condemnation cases stated by the Department of Justice to be pending.

In the Southern District of California there have been filed since the year 1951 when Rule 71A(h) was promulgated, 247 eminent domain cases involving 7,280 tracts. Of those tracts 5,562 were unadjudicated as of October 2, 1959 (Supplemental Record, p. 2). There have been references to commissioners on that district

pursuant to that Rule of only 21 cases involving only 496 tracts in the entire time the Rule has existed. If the Department of Justice's statistical method, which uses tracts or parcels as the unit of measurement, is followed, something less than 7% of the total tracts filed in eminent domain proceedings in the Southern District of California since the enactment of Rule 71A(h) and less than 10% of pending tracts in that district have been referred to commissioners pursuant to that Rule. The statistics thus indicate a very restricted use of Rule 71A(h) references on the part of the district judges. Such being the case, there appears to be no real reason why the administration of justice calls for the granting of the writ of certiorari in the cases here involved.[10]

**A Petition for Certiorari Is Not the Proper Proceeding in Which to Seek an Amendment To a Federal Rule of Civil Procedure.**

Much of the petition for certiorari is directed to the proposition that certain of the standards for reference to commissions set forth in Rule 71A(h) should not be there. It is respectfully submitted that there is available to the Department of Justice an orderly procedure to amend or repeal a rule duly adopted as one of the Federal Rules of Civil Procedure. That orderly procedure, it is submitted, does not include the seeking of such an

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[10]The use of commissioners pursuant to Rule 71A(h) may very well disappear entirely for reasons entirely extraneous to the Rule or its operation. See H. R. 11666 enacted by the House of Representatives after testimony by persons appearing for the Department of Justice and which is presently pending before the Senate. Section 207 of H. R. 11666 provides:

> "None of the funds appropriated by this title may be used for the compensation of commissioners appointed in lands cases under Rule 71A(h) of the Federal Rules of Civil Procedure."

amendment or repeal by way of a petition for certiorari. If a change or repeal of a rule is sought before the Judicial Conference and the statutory process followed, it is possible for information to be compiled from all districts upon which an informed determination can be made. If, on the other hand, as here, an amendment or restriction to a rule is sought by a petition for certiorari and the petitioner, as here, supports its petition by statistics outside the record, there is no effective way to test the validity of the statistical data alleged to be present in other districts. It is respectfully submitted that the use of the petition for certiorari should be confined to seeking a review of the record in a particular case.

**The Court of Appeals Did Not Abuse Its Discretion in Denying a Writ of Mandamus.**

Mandamus against a judge is an extraordinary and drastic remedy, *Ex parte Fahey,* 332 U. S. 258, and in every case may be granted or withheld in the sound discretion of the court. *Roche v. Evaporated Milk Association,* 319 U. S. 21; *LaBuy v. Howes Leather Co.,* 352 U. S. 249.

In the case of the reference to Commissioners under Rule 71A(h) here involved, no extraordinary circumstances are present which would have justified the Court of Appeals in exercising its discretion to proceed by way of the extraordinary writ of mandamus. Rule 71A(h) grants to the District Judge a discretion to refer a case to a commission for trial of the issue of just compensation in lieu of a jury where a jury trial has been demanded. The Rule sets forth certain standards to be considered by the trial judge in exercising the discretion granted. Here the orders of reference clearly show that the trial judge considered the factors stated in the Rule.

When the Court of Appeals refused to issue a writ of mandamus, under such circumstances, it cannot be said that there was any abuse of discretion on the part of that Court, recognizing that there is no constitutional right to a trial by jury in condemnation cases. *Bauman v. Ross*, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270.

**The Petitioner Did Not Establish Before the Court of Appeals That Its Right to the Extraordinary Writ of Mandamus Is Clear and Indisputable.**

It is respectfully submitted that since these cases arise out of an application for writ of mandamus by the United States, the burden is upon the petitioner to establish that the references to commissioners were an abuse of discretion, and not upon the respondent or the landowners to again establish that the references were valid. That burden upon the petitioner is a heavy one. Thus, this Court has stated in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 384

> "We note additionally that the petitioner has not met the burden of showing that its right to issuance of the writ is 'clear and indisputable' (citations omitted)."

In its application for writ of mandamus before the Court of Appeals and in its petition for certiorari, the petitioner has made no showing whatsoever that the reference of any one of the cases here involved was improper. What the petitioner has attempted to do is to establish that Judge Hall has referred four separate groups of cases to commissioners pursuant to Rule 71A(h) and to reason from that fact that the Judge has made a "blanket reference".

It is respectfully submitted that, without a showing that the references in individual cases were improper, the petitioner has established nothing more than a coincidence of reference of four groups of cases at about the same time. Since it is highly probable that each of the four groups of cases was a proper group of cases for a reference, and since the petitioner has not negatived nor detracted from that probability in the slightest, it is submitted that petitioner has by no means carried the heavy burden placed upon it.

**The Trial Judge Properly Exercised the Discretion Granted to Him by Rule 71A(h) in Referring the Pertinent Cases to Commissioners.**

In making the references to commissioners in the Casitas Dam and Reservoir cases, the Lemoore Naval Air Station cases, the Success Dam cases, and the Terminus Dam cases, the trial judge exercised a discretion specifically granted him by the Rule and specifically considered the factors expressed by the Rule to govern the exercise of that discretion. Those factors as stated in the Rule are "character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice".

**Character of the Land.**

The trial judge considered the character of the property involved.[11] Although he did not phrase his orders with the word "character", the orders did consider the nature of the property and its varied terrain and uses (pp. 1, 8, 17, 27), and the type and kind of the nature of rights or

[11]Contrary to the statement on page 18 of the petition, the finding of the character of land in the Casitas, Terminus and Success cases was the same in all those cases.

interests in the property claiming just compensation (pp. 1, 8, 17, 27). Character of land similar to that involved in the instant matters has been held to be a factor justifying a reference to commissioners. *United States v. Waymire*, 202 F. 2d 550, and *United States v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492.

The petition for certiorari recognizes that the trial judge did consider the factor of character of the land in exercising his discretion. The petition argues, however, that because land of the same character may be involved in other cases, the factor as here present does not justify a reference. It is submitted that such is neither the wording nor the intent of Rule 71A(h). The Rule was adopted by reason of a satisfactory experience with the use of commissioners in the Tennessee Valley Authority land acquistions (Report of Advisory Committee, 7 Moore's Fed. Practice, 2d Ed., p. 2741). In the Tennessee Valley Authority cases, unique lands were not involved and to the contrary, the condemnations were oftentimes of lands of similar character to other lands within the project. It is respectfully submitted that when the Rule states that the trial judge is to consider the character of the land, that statement requires merely that the trial judge determine that in his judgment, by reason of the nature of the property involved a commission will be more likely to give a just result than will a jury. Nowhere does Rule 71A(h) give either party to the litigation the right to substitute its judgment for that of the court.

**Location of the Property.**

The court also considered the location of the property involved in exercising its discretion to refer the cases to commissioners pursuant to Rule 71A(h). The distances

of the property involved from the place of trial are stated, *infra*, at page 3 of this brief. Cases which have considered comparable distances significant and justifying a reference to a commission are *United States v.* 1,584.11 *Acres of Land, etc.*, 141 Fed. Supp. 720, 721 (E. D. S. C. 1956) (69 miles); *United States v.* 5,677.94 *Acres of Land, etc.*, 25 Fed. Rules Serv. 71A-h.3, Case 3 (D. Mont. 1958) (100 miles); *United States v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492, 495 (8th Cir. 1955) (125 miles).

**Quantity of Property.**

The trial court also considered the quantity of the property to be condemned in making its references. The quantities of land involved in each of the groups of cases are stated, *infra*, at page 5 of this brief. In many cases, also, the determination of just compensation will require the valuation of larger properties of which the property condemned is a part (pp. 86, 93, 99, 126). Cases which have considered similar amounts of land significant in determining the propriety of a reference to a commission are: *United States v. 2,792.82 Acres of Land, etc.*, 114 Fed. Supp. 76 (E. D. S. C. 1953) (851 acres taken out of a parcel of 4,000 acres); *United States v. Cunningham*, 246 F. 2d 330 (4th Cir. 1957) (1858 acres); *United States v. 5,677.94 Acres of Land, etc.*, 25 Fed. Rules Serv. 71A-h.3, Case 3 (D. Mont. 1958) (5,677.94 acres).

In arguing against the validity of the quantity factor as applied by Judge Hall in these cases, the petition for certiorari again argues that a similar quantity of land will be present in many Bureau of Reclamation type condemnations. It is respectfully submitted that this argument is not an argument against the propriety of the references here made by Judge Hall but rather an argu-

ment against Rule 71A(h). Thus, the Advisory Committee in its report to the Supreme Court dated March 1951, states in part:

> "Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference. . . . These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydro-electric power, reclamation, National forests, and others." (7 Moore's Fed. Practice, 2d Ed., p. 2741).

By any standard, the amounts of property taken here are large and if similarly large quantities of land will be taken in other totally separate flood control and reclamation projects, that fact in no way detracts from the validity of the reference here by reason of the quantity of the properties.

**Other Reasons in the Interest of Justice.**

In making the references, Judge Hall also considered other reasons in the interest of justice. Those other reasons were complexity of the issues involved and the probability that appointment of commissioners in each of the groups of related cases will result in more uniformity in award for like property involved in the particular group of cases than could be expected if each separate case were tried by a jury. Related to this latter statement is the finding by the trial court that it would be impractical if not impossible to try the issue of just compensation of the various properties involved in each group of related cases before one jury.

Complexity of the issue of valuation has been held to be a reason justifying a reference to commissioners in *United States v. Buhler*, 254 F. 2d 876; *United States v. Cunningham*, 246 F. 2d 330; *United States v. Waymire*, 202 F. 2d 550. Nor is *LaBuy v. Howes Leather Co.*, 352 U. S. 249, a holding to the contrary. *LaBuy* involves not a reference pursuant to Rule 71A(h) but a reference to a master under Rule 53 of an issue which, if not referred to the master, would have been tried by the court without a jury. If the choice of a forum is between the judge himself and a master, it is clear that the judge should be better able to determine a complex issue than should the master. That is what the Supreme Court found in *LaBuy*. In the case of a Rule 71A(h) reference, however, the choice of forum is between a commission of three persons chosen for their ability, and a jury of twelve chosen by lot. If we accept the basic rationale of *LaBuy* that the more complex the issue, the more skilled should be the forum which should hear it, the result is inescapable that complexity should in itself justify a Rule 71A(h) reference.

Nor is complexity of issue the only factor which was considered by the trial judge as a reason for reference to commissioners in the interest of justice. The order recites that the references of each related group of cases were made in the interest of seeking uniformity of award for like properties. This desire for uniformity was expressed as a reason for the use of a commission by the Advisory Committee in recommending Rule 71A(h) (7 Moore's Federal Practice, 2d Ed., p. 2741).

**The Order of Judge Hall Referring the Casitas Dam and Reservoir Cases to Commissioners Is Not Excessive in Scope.**

The Petition for Certiorari argues that Judge Hall's orders referring the cases here involved to commissioners refer more than the issue of just compensation to those commissioners and thus are a reference of matters not encompassed within Rule 71A(h). While such an argument conceivably might have applied to the orders originally entered by the Court, those orders were amended significantly prior to the commencement of hearings by the commissioners (p. 140).

It is submitted that it is the amended orders under which the commissioners are operating and not the original orders. While the original orders purportedly empowered the commissioners to file a report setting forth their conclusions as to the person or persons or entity entitled to receive the award, the amended orders merely direct the commissioners to report to the judge the person or persons or entity *claiming* to be entitled to receive such award. It is respectfully submitted that a direction to the commissioners to report to the Judge those persons who have presented contentions before them is by no means a direction to exercise a power not granted by the Rule.

The petition also contends (see footnote 9 on page 18) that the orders of reference are excessive in scope in that they direct the commissioners to make a separate award of just compensation and values with respect to each separate parcel, interest, ownership, or claim involved. Again, it is respectfully submitted that nothing in these orders goes beyond the scope of the reference permitted in Rule 71A(h). It would appear that the commissioners in arriving at the total value of the real property in-

volved can very well consider the valuation of the parts making up the whole, and can report to the judge their conclusions in regard to the valuations assigned to those parts of the whole. As a matter of fact, the petitioner, in its Petition in a companion case in which it seeks certiorari in *United States v. Cunningham*, contends, at pages 15 and 16, that commissioners are required to go much beyond this and actually to find separate values for each category of land included within the condemnation action.

Assuming *arguendo* that the orders of Judge Hall may be interpreted to refer the matter of apportionment of award to commissioners (which is, it is submitted, by no means the normal interpretation of the amended orders), it is respectfully submitted that the petitioner should not be allowed to complain of such an order by way of petition for the extraordinary writ of mandamus. In the first instance, the petitioner will have its remedy by appeal from the judgment at which time there will have been established whether or not there is any question of apportionment of award in any particular case. See *Roche v. Evaporated Milk Association*, 319 U. S. 21. Secondly, it appears that in no event will petitioner have any interest in how a particular award is apportioned. *United States v. Dunnington*, 146 U. S. 338; *United States v. Adamant Co.*, 197 F. 2d 4 (C. A. 9); *Burkhart v. United States*, 227 F. 2d 659 (C. A. 9); *United States v. Certain Lands*, 129 F. 2d 918 (C. A. 2). If petitioner has no interest in apportionment of a condemnation award, its status to overturn by mandamus a reference to commissioners on the basis that they have excessive powers in regard to the matter in which the petitioner has no interest is at best so highly doubtful as to justify denying the writ.

## Conclusion.

It is respectfully submitted that the petition for certiorari filed herein presents no issue of significant importance in judicial administration, that the questions raised in the petition have been decided uniformly by Courts of Appeal for seven Circuits, and that the trial court properly exercised a discretion expressly granted to it by Rule 71A(h) in referring certain groups of cases to commissions, and the Court of Appeals likewise properly exercised its discretion in denying a writ of mandamus which would have compelled the trial judge to vacate his orders of reference. For those reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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ROBERT M. JONES,

*Counsel for amicus curiae Dorothy R. Battin.*

## APPENDIX.

In the Supreme Court of the United States, October Term, 1959.

No. .....

United States of America, Petitioner vs. Honorable Peirson M. Hall, Chief Judge, United States District Court for the Southern District of California, Respondent.

**Affidavit Supplementing Brief of Amicus Curiae in Opposition to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.**

State of California, County of Los Angeles—ss.

Philip H. Angell, being first duly sworn, deposes and says:

That affiant is one of the attorneys of record for the following persons, who are owners of land subject to condemnation proceedings pending in the United States District Court, Southern District of California, Central Division:

John H. Dunshee, Frank G. Dunshee, Edward L. Lau and Margaret C. K. Lau, defendants in Action No. 20577-PH;

John H. Dunshee and Frank G. Dunshee, defendants in Actions 678-57-PH and 877-57-PH;

Charlotte F. Dunshee and Harvey Scott Dunshee, as guardian of the estate of Charlotte F. Dunshee, an incompetent person, defendants in Action 877-57-PH;

Jack M. Eakins and Adele L. Eakins, defendants in Action 678-57-PH; and

Dorothy D. Battin, defendant in Action 877-57-PH.

Affiant has been the principal trial attorney in charge of the preparation and actual trial of the aforesaid three actions and is thoroughly familiar with all aspects thereof.

Said three actions are among the group of unconsolidated condemnation cases involved in the Casitas Dam Project. A statement of the character, location and quantity of the property to be condemned and of the complexity of the issues involved in the valuation thereof for the parcels owned by defendants represented by affiant is contained in the appendices to the petition for writ of mandamus filed by the United States in the Court of Appeals at pages 117 through 139.

The complaint and declaration of taking on behalf of the United States in Action No. 20577-PH was filed October 10, 1956; in Action No. 678-57-PH on June 3, 1957; and in Action No. 877-57-PH on July 18, 1957. By order of said District Court, dated May 20, 1959, said three actions, together with six other actions involving property in the Casitas Dam Project, were referred to three commissioners for determination of the issue of just compensation pursuant to Rule 71A(h) F. R. C. P. The Commissioner on July 15, 1959 originally scheduled the nine cases for successive trials commencing September 1, 1959, without objection and with the consent of the United States. The United States on August 25, 1959 moved the District Court to set aside its order of reference; trial of the cases originally set for September 1, 1959 and October 1, 1959 was deferred pending ruling on the motion. On October 1, 1959, the District Court denied the motion, at which time the United States announced its intention of filing a petition for writ of mandamus. Such petition was not filed in the ensuing two months. The commissioners thereupon reset the

Casitas Dam cases without objection and with the consent of the United States. The three cases in which affiant's clients are defendants were set for trial commencing December 14, 1959. On December 12, 1959 the United States filed with the Court of Appeals its motion for leave to file petition for writ of mandamus and also sought from the Court of Appeals an order staying proceedings before the commissioners. The Court of Appeals on December 14, 1959 denied the stay, granted leave to file a petition and issued an order to show cause returnable January 5, 1960. Following a hearing on that date, the Court of Appeals on January 9, 1960 issued its opinion denying the writ. The United States on April 11, 1960 filed its petition for writ of certiorari herein.

Trial before the commissioners commenced December 14, 1959, with the consent of the United States, and has continued without substantial interruption since that date to and including the date of this affidavit. Defendants represented by affiant have rested their case and counsel for the United States has stated to the commissioners that its case will be completed in three weeks. In excess of 200 exhibits, many of which are multiple in character, have been introduced. Much of the engineering and other technical data relating to the matter of valuation which has been presented in the nearly five months of trial is common not only to the three cases of defendants represented by affiant but also to the other Casitas Dam Project cases now pending before the commissioners. The availability of such background data, common to all the cases will immeasurably shorten the trial time and simplify the presentation of the remaining Casitas cases.

The trial before the commissioners has justified the District Court's determination that the ends of Justice

required the reference. The trial itself has demonstrated beyond question that the issues could not have been effectively presented to nor intelligibly considered by a jury. The complexity of the valuation problems necessarily involved are illustrated by the volume of evidence relating to water rights, engineering studies, land uses and classifications and the fact that one of the expert appraisers presented by defendants had studied the properties involved and related comparables for more than a year prior to trial and was under cross-examination by the United States for approximately six weeks of trial.

Affiant's clients have expended in excess of $100,000.00 in the preparation and trial of these cases to date, exclusive of attorneys' fees. Any termination of the present proceedings before the commissioners prior to the completion of the present trial and the approval of the commissioners' determination would cause grave and irreparable injury to these defendants. Any review of the propriety of the District Court's order of reference to commissioners by the Court of Appeals or by the United States Supreme Court should be had in the normal course of appellate review when the entire record of the evidence necessarily relevant to a proper determination of the issue of just compensation will be available to the reviewing court. Any such review accomplished through the extraordinary writ procedure prior to the completion of actual trial would necessarily present only a partial picture of the nature and character of the property condemned and of the complexity of the issues involved in determining the issue of just compensation.

The petition for certiorari and brief in support thereof indicates that the United States is in reality seeking to evade the operation of Rule 71A(h) with no regard for

the great injustice which would thereby result to the landowner defendants, who are the real parties in interest, in each and all of the Casitas Dam cases. This is also illustrated by the delays of the United States in seeking Appellate and United States Supreme Court extraordinary review of the order of reference. The same design is disclosed by testimony by the Honorable S. A. Andretta, Administrative Assistant Attorney General, and by the Honorable Perry W. Morton, Assistant Attorney General, Lands Division, before the Rooney Sub-Committee of the Appropriations Committee of the House of Representatives when that Sub-Committee was considering H.R. 11666 (Hearings before the Committee on Appropriations of the United States House of Representatives 86th Congress, pp. 158 et seq.).

Mr. Morton testified before that Sub-Committee concerning the subject of Rule 71A(h) references as follows:

> "We have fought this business all the way through to the point where we are just abount out of gas in our efforts to do anything about it within the framework of the cases, and I frankly do not know any other answers.
>
> "It is a highly expense procedure. It costs the Government more in many ways and it costs the landowners more in many ways.
>
> "It is said, but the statement is completely unsupportable, that trial by commissioners results in a more expeditious disposal of cases. I could demonstrate for the next 2 days that this is simply not so. It handicaps everyone in terms of any right of appeal because the rule is different on appeal in jury cases from what it is on appeal from a judgment entered upon a commission's award.

"I think the view of some of the judges, though I think they are misleading themselves, is that they are saving themselves time, and indeed in some of these districts the condemnation caseload is a little bit overwhelming. But I think the thing they fail to recognize is that if they properly perform their judicial function they have to go over these transcripts anyway, if the award is contested on either side, before they can enter a judgment with proper judicial foundation.

"The trouble here is, of course, that as long as a case is tried before a lay commission, even if a lawyer is the chairman of it, there simply are no rules of evidence as a practical matter. They put in everything, including the kitchen sink, making transcripts that are two and three times as long as they would be if a judge set in control of the case with any rules of evidence imposed at the time the testimony is coming in."

H.R. 11666 was then reported by the Committee to the House of Representatives. The report of the Sub-Committee quoted Mr. Morton's statement that, "It is a highly expensive procedure. It costs the governn nt more in many ways and the landowners more in mar ways", and accordingly recommended the adoption Section 207 of H.R. 11666 which provides:

"Section 207. None of the fur s appropriated by this title may be used for the co pensation of commissioners appointed in lands cases under Rule 71A(h) of the Federal Rules of Civil Procedure."

Any change in the scope and pplicability of Rule 71A(h) F.R.C.P. should be accomplished in the normal

manner contemplated by the rules; such change should not be effected by resort to the extraordinary writ procedure in cases presently pending and in the course of trial before the commissioners. Certainly any such retroactive application of a change in rules would be most prejudicial to defendant landowners.

Further affiant saith not.

Philip H. Angell
PHILIP H. ANGELL

Subscribed and sworn to before me this 5th day of May, 1960.

DOROTHY IRENE POPE
*Notary Public in and for the County of Los Angeles, State of California.*